In the Supreme Court of the United States

OCTOBER TERM, 1972

No. 71-1656

JOEL ACHTENBERG, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A18) is not yet reported. The oral opinion of the district court is not reported.

JURISDICTION

The judgment of the court of appeals was entered on April 3, 1972. A petition for rehearing and for rehearing *en banc* was denied on May 23, 1972. The

petition for a writ of certiorari was filed on June 21, 1972. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether 18 U.S.C. 2153(a) is void for vagueness.
2. Whether the evidence supports the conviction.

STATUTES INVOLVED

The pertinent provisions of 18 U.S.C. 2151, 2153 (a) and 2155 are set forth at Pet. 3-5.

STATEMENT

After a jury trial in the United States District Court for the Eastern District of Missouri, petitioner was convicted of attempting to destroy "war material" and "war premises" in violation of 18 U.S.C. 2153(a). He was sentenced to fifteen years' imprisonment. On appeal, the court of appeals rejected petitioner's contentions that Section 2153(a) was unconstitutionally vague and that the evidence was insufficient to support the conviction, but reversed the conviction because of prejudicial error committed during the trial and remanded for a new trial (Pet. App. A1-A18). Petitioner seeks to avoid the new trial by asking this Court to review the rulings upholding the constitutionality of the statute and the sufficiency of the evidence.

This case arose out of a series of incidents on the Washington University campus in St. Louis, Missouri

immediately following the tragic confrontation of students and troops at Kent State University in Ohio on May 4, 1970 (Pet. App. A2). During the evening of May 4, a rally was held on the Washington University campus to protest the shootings at Kent State, the presence of the Reserve Officer Training Corps ("ROTC") program on the university campus and the United States involvement in the war in Southeast Asia (Pet. App. A2-A3). At the conclusion of the rally the assembled crowd, including petitioner, proceeded to the area on the campus where the Air Force and Army ROTC buildings were located (Pet. App. A3).[1] Several of the demonstrators broke open the door to the Army building and some demonstrators set fires in the building (*ibid*).

The Army ROTC program on the Washington University campus was administered in accordance with prescribed statutes, 10 U.S.C. 2102, *et seq.* (Tr. 168)[2] and was established "[f]or the purpose of preparing selected students for commissioned service in the Army * * *" (10 U.S.C. 2102).[3] The members of the

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[1] The charges against petitioner relate only to the Army ROTC building.

[2] "Tr." refers to the transcript of the proceedings in the district court.

[3] To be eligible for membership in the ROTC program a person must be a student at an educational institution where a unit of Advanced ROTC is established (10 U.S.C. 2103); enlist in a reserve component of an armed force (10 U.S.C. 2104); and agree to accept an appointment, if offered, as a commissioned officer in a branch of the service (10 U.S.C. 2104). A member of the program who does not complete the

ROTC staff were regular Army personnel (Tr. 122, 166) and the supplies and equipment stored in the Army ROTC building on May 4-5, 1970, including M-1 and M-14 rifles, office supplies, helmets, tents, uniforms and other equipment, were the property of the United States (Pet. App. A4) and were used in connection with the training of the cadets enrolled in the ROTC program (Tr. 133, 170). The Army ROTC building was owned by Washington University (Pet. App. A4).

Following the May 4-5, 1970 demonstrations, petitioner was indicted for willfully attempting to destroy, by fire, the Army ROTC building, during a period of national emergency, with reason to believe that his act might injure, interfere with and obstruct the United States in preparing for and carrying on defense activities in violation of 18 U.S.C. 2153(a) (Pet. App. A1-A2). During the trial, a university policeman testified that on the night of May 4-5, 1970 he observed petitioner twice carrying burning material into the Army ROTC building (Pet. App. A17). Testifying in his own behalf, petitioner admitted that he participated in the protest rally (Tr. 494-495) and in the demonstration at the ROTC buildings (Tr. 498-499), but denied that he entered the Army ROTC building or attempted to set fire to the building (Pet.

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course or does not accept his commission may be ordered to active duty in an enlisted grade for not more than two years (10 U.S.C. 2105). Students enrolled in the Advanced Program receive a monthly monitary subsistence allowance (10 U.S.C. 2110).

App. A4). Additionally, petitioner testified that he was aware of the ROTC program on the Washington University campus (Tr. 510), thought the Army ROTC building was connected with the program (Tr. 510), had in March 1970, attended and disrupted an ROTC class (Tr. 515, 516), and had previously attended approximately eight protest demonstrations at the ROTC buildings (Tr. 516).

ARGUMENT

1. Petitioner contends, as he did below, that the statute under which he was convicted, 18 U.S.C. 2153 (a), is unconstitutionally vague (Pet. 8). That Section makes it a crime "* * * when the United States is at war, or in times of national emergency as declared by the President or by Congress" willfully to destroy or attempt to destroy "any war material, war premises, or war utilities" "with intent to injure, interfere with, or obstruct the United States * * * in preparing for or carrying on the war or defense activities, or, with reason to believe that his act may injure, interfere with, or obstruct the United States * * * in preparing for or carrying on the war or defense activities * * *." Specifically, petitioner asserts that the terms "defense activities", "reason to believe", "national emergency", "preparing for", "war material" and "war premises" as used in the statute have no clear meaning.

The court of appeals properly concluded that "[t]he statute and its legislative history show that Congress intended * * * [the statute's] coverage to

be broad" (Pet. App. A7). In considering the Espionage Act of June 15, 1917, 40 Stat. 217, this Court construed the term "national defense" to be "'a generic concept of broad connotations, referring to the military and naval establishments and the related actvities of national preparedness.'" *Gorin* v. *United States*, 312 U.S. 19, 28. The term "defense activity" in 18 U.S.C. 2153(a) can properly be equated with the term "national defense" and, accordingly, should be given an equally broad construction. The Court in *Gorin* squarely rejected the contention that the words "national defense," as used in the statute, were not sufficiently definite to apprise the public of the activities prohibited by the statute (*ibid.*).

Nor are the other terms in Section 2153(a) impermissibly indefinite. The term "national emergency", for example, is qualified by the phrase "as declared by the President or by the Congress."[4] The words "preparing for" are part of common speech and need no special definition. See *Sproles* v. *Binford*,

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[4] In determining that there was a state of national emergency, the court of appeals properly held that "[t]he state of emergency proclaimed by the President on December 16, 1950, has not been terminated either by the President or by concurrent resolution of Congress. See *Sardino* v. *Federal Reserve Bank of New York*, 2 Cir., 361 F. 2d 106, 109. In our view, the statute contemplates a termination of the emergency only by act of the President or by concurrent resolution of Congress. No presidential proclamation or Congressional concurrent resolution has been enacted to terminate the emergency. Thus § 2153(a) is in effect and operative in the situation presented by this case." (Pet. App. A6).

286 U.S. 374, 393. Finally, the terms "war material" and "war premises" are defined in detail in 18 U.S.C. 2151.

2. Petitioner further contends that he did not interfere with "defense activities," within the meaning of the statute, and that, in any event, the articles in the Army ROTC building on the university campus were not "war material" and the building itself did not constitute "war premises." As we have noted, a narrow interpretation of the term "defense activities" is not supported by the legislative history of the statute or by judicial precedent. Moreover, the destruction of equipment used directly in the training of Army officers would appear to interfere with "defense activities" under any definition.[5] Similarly, the equipment destroyed was "war material," as defined by 18 U.S.C. 2151. Finally, under that Section, any place where "war material" is stored constitutes "war premises," regardless of ownership.

3. Petitioner argues, as he did below, that there was insufficient evidence before the jury to show that he acted, in the words of 18 U.S.C. 2153(a), "with

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[5] Petitioner argues that the application of 18 U.S.C. 2153(a) should be confined to the destruction of war material or premises directly connected with actual combat activities, since another statute (18 U.S.C. 2155), imposing a lesser penalty, prohibits the destruction of the same material in general (Pet. 16). Even if the two sections do differ in scope, however, material used in the training of Army officers for active military duty is used "in connection with * * * defense activities" and is thus "war material" as defined in Section 2151.

reason to believe that his act may injure, interfere with, or obstruct the United States * * * in preparing for or carrying on * * * defense activities." As we have noted, however, the evidence shows that petitioner was aware of the Army ROTC program and knew that the Army ROTC building was used in connection with the program. In addition to the destructive acts with which he is charged, the record shows that petitioner had previously disrupted an ROTC class. Under these circumstances, there is sufficient evidence to support a conviction under Section 2153(a) and, thus, petitioner can properly be retried under the remand from the court of appeals.

CONCLUSION

For the reasons stated, it is respectfully submitted that the petition for writ of certiorari should be denied.

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